

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 TONIE M. MARLOW, )  
8 Plaintiff, ) CASE NO. C06-520-RSL-MJB  
9 v. ) REPORT AND  
10 JO ANNE B. BARNHART, ) RECOMMENDATION  
Commissioner of Social Security, )  
11 Defendant. )  
12 \_\_\_\_\_)

13 Plaintiff Tonie Marlow appeals to the District Court from a final decision of the  
14 Commissioner of the Social Security Administration (the “Commissioner”) denying her  
15 application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act.  
16 For the reasons set forth below, it is recommended that the Commissioner’s decision be  
17 REVERSED and REMANDED for further proceedings.

18 I. PROCEDURAL HISTORY

19 Plaintiff applied for Disability Insurance Benefits (“DIB”) on December 10, 2002 (Tr. 55-  
20 57), alleging disability since December 24, 2001, and identifying her impairments as severe  
21 chronic pain, fibromyalgia, chronic myofascial pain syndrome, bursitis in hips, and migraine  
22 headaches (Tr. 68). The Social Security Administration denied Plaintiff’s application initially and  
23 upon reconsideration. (Tr. 29, 31.) A hearing was held before Administrative Law Judge  
24 (“ALJ”) Verrell Dethloff on June 20, 2005. (Tr. 353.) Plaintiff was represented by counsel and  
25

1 testified at the hearing. (Tr. 353-375.) The ALJ issued an unfavorable decision on January 19,  
2 2006, finding that Plaintiff's medically determinable impairments do not prevent her from  
3 performing her past relevant work, and thus, she was not under a disability at any time through  
4 the date of the decision. (Tr. 27.) On March 16, 2006, the Appeals Council denied Plaintiff's  
5 request for review, making the ALJ's decision the final decision of the Commissioner. (Tr. 6.)  
6 Plaintiff timely filed her appeal with this Court.

## 7 II. THE PARTIES' POSITIONS

8 Plaintiff requests that the Court vacate the Commissioner's decision and order the  
9 Commissioner to find Plaintiff disabled. (Dkt. 15.) Alternatively, Plaintiff requests that the  
10 Court reverse the Commissioner's decision and remand for further administrative proceedings.  
11 (*Id.*) Plaintiff argues that the ALJ erred by failing to: (1) provide a reason for rejecting the  
12 opinions of three treating doctors regarding the severity of Plaintiff's mental impairments; (2)  
13 consider Plaintiff's hip bursitis, insomnia, and migraine headaches, and find Plaintiff's carpal  
14 tunnel syndrome severe; (3) provide clear and convincing evidence for finding the Plaintiff not  
15 credible regarding her degree of pain and the nature and severity of her functional limitations;  
16 and (4) include all exertional and non-exertional limitations in the residual functional capacity  
17 assessment. (*Id.*) Defendant responds that the Commissioner's decision should be affirmed  
18 because it is supported by substantial evidence. (Dkt. 17.)

## 19 III. STANDARD OF REVIEW

20 The court may set aside the Commissioner's denial of social security disability benefits  
21 when the ALJ's findings are based on legal error or not supported by substantial evidence in the  
22 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir. 1993). Substantial evidence is  
23 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence  
24 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,

1 881 F.2d 747, 750 (9<sup>th</sup> Cir. 1989). The ALJ is responsible for determining credibility, resolving  
2 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
3 1039 (9<sup>th</sup> Cir. 1995). Where the evidence is susceptible to more than one rational interpretation,  
4 it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639,  
5 642 (9<sup>th</sup> Cir. 1982).

#### 6 IV. EVALUATING DISABILITY

7 The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d  
8 1111, 1113 (9<sup>th</sup> Cir. 1999). Disability is defined as the inability to engage in any substantial  
9 gainful activity by reason of any medically determinable physical or mental impairment, which  
10 can be expected to result in death, or which has lasted or can be expected to last for a continuous  
11 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

12 The Social Security regulations set out a five-step sequential evaluation process for  
13 determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20  
14 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any  
15 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant  
16 must establish that he or she has one or more medically severe impairments or combination of  
17 impairments. If the claimant does not have a "severe" impairment, he or she is not disabled. *Id.*  
18 at § (c). At step three, the Commissioner will determine whether the claimant's impairment  
19 meets or equals any of the listed impairments described in the regulations. A claimant who meets  
20 one of the listings is disabled. *See Id.* at § (d).

21 At step four, if the claimant's impairment neither meets nor equals one of the impairments  
22 listed in the regulations, the Commissioner evaluates the claimant's residual functional capacity  
23 and the physical and mental demands of the claimant's past relevant work. *Id.* at § (e). If the  
24 claimant is not able to perform his or her past relevant work, the burden shifts to the

1 Commissioner at step five to show that the claimant can perform some other work that exists in  
2 significant numbers in the national economy, taking into consideration the claimant's residual  
3 functional capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d  
4 1094, 1100 (9<sup>th</sup> Cir. 1999). If the Commissioner finds the claimant is unable to perform other  
5 work, then the claimant is found disabled.

#### 6 V. SUMMARY OF THE RECORD EVIDENCE

7 Plaintiff was born on January 29, 1955 and was 50 years old at the time of the hearing  
8 before the ALJ. (Tr. 55, 353.) She is a high school graduate (Tr. 74) and has worked previously  
9 as a custom framer (Tr. 69). She has been diagnosed with fibromyalgia (Tr. 295),  
10 hypothyroidism (Tr. 312), major depression, anxiety, and migraines, (Tr. 250, 333), panic  
11 disorder (Tr. 250), and bursitis in hips (Tr. 144). In her disability report, Plaintiff indicated that  
12 her condition limits her ability to work because she can stand and walk for only a limited time  
13 and because she cannot be relied upon to report to work regularly due to the unpredictability of  
14 the pain. (Tr. 68.) Other evidence relevant to Plaintiff's claims is incorporated into the  
15 discussion below.

#### 16 VI. THE ALJ'S DECISION

17 The ALJ found that Plaintiff had not engaged in substantial gainful activity since the  
18 alleged onset of disability. (Tr. 27.) The ALJ also found that Plaintiff's fibromyalgia, diabetes,  
19 irritable bowel syndrome, obesity, hypothyroidism, and sleep apnea are severe impairments, but  
20 that they do not meet or medically equal one of the listed impairments. (*Id.*) The ALJ found that  
21 Plaintiff's allegations regarding her limitations are not totally credible. (*Id.*) The ALJ also found  
22 that Plaintiff has the residual functional capacity to lift twenty pounds occasionally and ten  
23 pounds frequently, and that she could sit, stand, or walk for six hours in an eight hour day. (*Id.*)  
24 Finally, the ALJ found that Plaintiff's severe impairments do not prevent her from performing her

1 past relevant work. (*Id.*) Accordingly, the ALJ concluded that Plaintiff was not disabled at any  
2 time through the date of the decision. (*Id.*)

## 3 VII. DISCUSSION

### 4 A. MENTAL IMPAIRMENTS

5 Plaintiff argues that the ALJ erred in (1) determining that Plaintiff has no severe mental  
6 impairments, rejecting without reason the opinions of three treating doctors who found GAFs  
7 between 51-60, relying instead upon a State agency psychologist's Psychiatric Review Technique  
8 (PRT), and an evaluating doctor's opinion who found a GAF of 65, and (2) failing to prepare his  
9 own PRT. The Commissioner opposes these arguments.

#### 10 (1) Physicians' Opinions

11 Generally, more weight should be given to the opinion of a treating source than to the  
12 opinions of doctors who did not treat the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
13 1996) (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987)). The opinion of an examining  
14 doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate  
15 reasons that are supported by substantial evidence in the record. *Lester*, 81 F.3d at 830-31  
16 (citing *Murray v. Heckler*, 722 F.2d 499, 502 (9<sup>th</sup> Cir. 1983)). An impairment is not severe when  
17 medical evidence establishes only a slight abnormality or combination of slight abnormalities that  
18 have no more than a minimal effect on an individual's ability to work. *Yuckert v. Bowen*, 841  
19 F.2d 303, 306 (9<sup>th</sup> Cir. 1988).

20 The ALJ found that Plaintiff does not have a severe mental impairment because her  
21 depression and anxiety had been treated by medication and therapy, resulting in improvement, as  
22 noted by Dr. Catherine Strong. (Tr. 24.) The ALJ also found that no medical provider has  
23 suggested that Plaintiff has a significant limitation related to her depression and anxiety. (*Id.*)  
24 The ALJ noted that Plaintiff is able to travel, associate with friends, and paint, suggesting few  
25

1 limitations in social functioning, concentration, persistence, or pace. (*Id.*) The ALJ also noted  
2 that Plaintiff's limitations in activities of daily living are related to pain rather than mental  
3 impairments, and that she has had no episode of decompensation of extended duration. (*Id.*)  
4 The ALJ adopted the findings of State agency psychologist, Dr. William Lysak, which he found  
5 to be strongly supported by examining psychiatrist, Dr. David Sandvik. (*Id.*)

6 Plaintiff was examined by Dr. David Sandvik in April 2003, and treated by Dr. Strong  
7 from December 2001 to May 2002, by Dr. David Koch, from July 2003 to August 2004, and by  
8 Dr. Susan Hakeman, from September 2004 to February 2005. (Tr. 170, 143, 234, 333.) Dr.  
9 Sandvik assessed Plaintiff's GAF as 65, while each of the three treating doctors assessed her as  
10 between 51 and 60. (Tr. 173, 143, 247, 333.) Dr. Strong indicated that by the time she stopped  
11 seeing Plaintiff in May 2002, she was significantly less depressed and less anxious. (Tr. 168.)  
12 However, in the month before, Dr. Strong assessed Plaintiff's GAF as between 51 and 60. (Tr.  
13 143.) Thus, while Plaintiff improved, her functioning appears to have remained limited toward  
14 the end of her treatment. Later GAF assessments by subsequent treating psychiatrists also  
15 indicated limitation.

16 Dr. Koch assessed Plaintiff as "unable to work due to fibromyalgia," with a GAF of 55 in  
17 July 2003 (Tr. 247<sup>1</sup>), and Dr. Hakeman assessed her GAF as 60 in September 2004 (Tr. 338).  
18 However, Dr. Koch's assessment of inability to work was specifically based upon fibromyalgia,  
19 rather than mental impairment, and in August 2003, he assessed Plaintiff as "currently doing well  
20 with respect to her major depression, though continues with her anxiety disorder symptoms and  
21 intermittent panic attacks." (Tr. 248.) It is not clear from the record whether Dr. Hakeman's  
22

---

23 <sup>1</sup>Dr. Koch's treatment notes were incorrectly paginated in the administrative record. The  
24 correct sequence appears to be as follows: 234, 249, 250, 247, 248, 246, 245, 244, 243, 242,  
25 241, 240, 239, 238, 237, 236, 235.

1 and Dr. Strong's GAF assessments were based upon Plaintiff's mental or physical condition. Dr.  
2 Hakeman diagnosed Plaintiff with major depression in full to partial remission and anxiety. (Tr.  
3 338.) Dr. Strong noted that Plaintiff's anxiety is due largely to pain, and that her depression is  
4 due to pain and fatigue. (Tr. 168.) She also noted that Plaintiff's concentration sometimes  
5 varies, largely due to distracting pain. (Tr. 168.)

6 I find that the record indicates that Plaintiff's limitations, as assessed by her treating  
7 mental health providers, were based at least in part on physical rather than mental conditions.  
8 However, I also find that the record indicates that Plaintiff's mental and physical conditions may  
9 be interrelated, but the record is not fully developed on this point, nor with regard to whether  
10 Plaintiff has significant limitation based on mental impairment.

11 To the extent that the treating doctors' assessments were based upon mental conditions  
12 or interrelated physical and mental conditions, I find that the ALJ did not provided specific and  
13 legitimate reasons in the record for rejecting the opinions of the treating doctors in favor of the  
14 State agency psychologist.

15 Additionally, I find that it is unclear how Plaintiff's travel, socializing, and painting  
16 supports the rejection of her treating doctors, whose GAF assessments were made with  
17 awareness of these activities. Nor is it clear how these activities indicate few limitations in social  
18 functioning, concentration, persistence, or pace. Plaintiff paints approximately two to three  
19 hours per week. (Tr. 99.) She has been encouraged by her treating psychologist to increase her  
20 social activities as part of her treatment plan (Tr. 143); however, she cannot be with groups of  
21 people longer than one and a half hours and often must leave in the middle of dinner (Tr. 102).  
22 Plaintiff's travel is discussed *supra*, under paragraph C.

23 //

24 //

25 REPORT AND RECOMMENDATION

26 PAGE - 7

(2) Psychiatric Review Technique

The severity of mental impairments must be evaluated using a special technique at each level in the administrative review process. 20 C.F.R. §§ 404.1520a(a), 416.920a(a). The written decision issued by the ALJ must incorporate the pertinent findings and conclusions based on the technique and show the significant history and functional limitations that were considered in reaching a conclusion about the severity of the impairment. 20 C.F.R. § 404.1520a(e)(2). A Psychiatric Review Technique Form (PRTF) must be completed at the initial, reconsideration, ALJ hearing, and Appeals Council levels. 20 C.F.R. §§ 404.1620a(d), 416.920a(d). Where there is a colorable claim of mental impairment, the PRTF must be completed and appended to the decision, and the failure to do so requires remand. *Gutierrez v. Apfel*, 199 F.3d 1048, 1051 (9<sup>th</sup> Cir. 2000) (citing 20 C.F.R. § 404.1520a). A PRTF completed by other than the ALJ, dated more than a year before the hearing, and largely incomplete do not cure the violation. *Id.*

A PRTF was completed on May 1, 2003 by State agency psychologist William Lysak. (Tr. 174.) The hearing before the ALJ occurred on June 20, 2005. (Tr.353.) Two and a half years had elapsed between the completion of the PRTF and the hearing. Subsequent to the completion of the PRTF, Plaintiff was treated by Dr. Koch from July 2003 to August 2004, and by Dr. Hakeman from September 2004 to February 2005. (Tr. 234, 333.) Dr. Koch diagnosed Plaintiff with recurrent major depression, panic disorder, and generalized anxiety disorder. (Tr. 250.) Dr. Hakeman diagnosed Plaintiff with anxiety and major depression in full to partial remission. (Tr. 333-38.) Their opinions were not contemplated in the PRTF. Prior to completion of the PRTF, Dr. Strong had diagnosed Plaintiff with depression and anxiety (Tr. 143). Based on the diagnoses of depression and anxiety by three treating doctors, a colorable claim of mental impairment exists. Accordingly, I find that a PRTF must be completed at the



1 ALJ level, and that the ALJ's decision must incorporate the pertinent findings and conclusions  
2 based on the technique and show the significant history and functional limitations that were  
3 considered in reaching a conclusion regarding the severity of Plaintiff's mental impairment.

4 B. PHYSICAL IMPAIRMENTS

5 Plaintiff argues that the ALJ erred by failing to (1) address Plaintiff's bursitis, as distinct  
6 from her fibromyalgia, (2) consider the combination of impairments in light of the bursitis, (3)  
7 consider Plaintiff's sleep disorder related to mental problems distinct from sleep apnea, (4) find  
8 Plaintiff's carpal tunnel syndrome severe, and (5) address Plaintiff's migraine headaches. The  
9 Commissioner rejects all of these propositions.

10 The ALJ evaluates a claimant's symptoms, including pain, considering all available  
11 evidence and statements. 20 C.F.R. §§ 404.1529, 416.929. A claimant's impairment, or  
12 combination of impairments, is not severe if it does not significantly limit the claimant's physical  
13 or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 404.1521(a). An  
14 impairment or combination of impairments can be found "not severe" only if the evidence  
15 establishes a slight abnormality that has "no more than a minimal effect on an individual's ability  
16 to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir. 1996) (internal citations omitted).  
17 The ALJ must consider the combined effect of all impairments on the claimant's ability to  
18 function, without regard to whether each alone was sufficiently severe. (*Id.*)

19 First, the ALJ did not address Plaintiff's alleged bursitis, and Defendant argues that  
20 Plaintiff has not shown how hip pain, separate from fibromyalgia, causes significant limitations.  
21 This is in error when one reviews the record. In her Disability Report, Plaintiff listed chronic  
22 pain from fibromyalgia, chronic myofascial pain syndrome, bursitis in hips, and migraine  
23 headaches as the conditions that limit her ability to work. (Tr. 68.) Dr. Philip Zeidner noted that  
24 Dr. Sakehara had done EMG studies and diagnosed "fibromyalgia, chronic myofascial pain, and  
25

26 REPORT AND RECOMMENDATION

PAGE - 9

1 bursitis in her hips.” (Tr. 144.) Dr. Marian Johnston assessed Plaintiff with SI joint pain and  
2 dysfunction and, separately, with fibromyalgia. (Tr. 317-322, 324-326.) Plaintiff testified as to  
3 physical and mental limitations due to pain in her hips. (Tr. 365.) I find that the record supports  
4 a finding of hip bursitis as distinct from fibromyalgia. I further find that the record has not been  
5 fully developed as to whether the bursitis causes severe impairment independent of the  
6 fibromyalgia.

7 Second, the record also demonstrates that the ALJ did not address Plaintiff’s alleged  
8 sleep disorder related to mental problems, as distinct from her sleep apnea. Plaintiff was  
9 diagnosed with sleep apnea by Dr. William Waltner in July 2001. (Tr. 155.) She was  
10 successfully treated for this ailment by October 2001. (Tr. 154.) Subsequently, Dr. Lysak noted  
11 a sleep disturbance in connection with Plaintiff’s depressive syndrome, an affective disorder. (Tr.  
12 177.) Dr. Strong, who began treating Plaintiff in December 2001, also noted that Plaintiff had  
13 frequently disrupted sleep, but did not indicate the source of the disruption. (Tr. 168.) Plaintiff  
14 reported to Dr. Zeidner in April 2002 that pain interrupts her sleep approximately twice nightly.  
15 (Tr. 144.) Plaintiff reported to Dr. Koch in August 2002 that despite resolution of the sleep  
16 apnea, she has insomnia, which she attributed to pain or worries. (Tr. 247-248.) Dr. Koch  
17 treated Plaintiff for her “sleep disorder” in September 2003, and he noted that her depression  
18 may not be the cause of her terminal insomnia. (Tr. 246.) Accordingly, I find that the record  
19 establishes that Plaintiff has insomnia unrelated to sleep apnea, although it is unclear from the  
20 record whether the insomnia is related to mental problems.

21 Third, the ALJ found that nothing in the record establishes a diagnosis of carpal tunnel  
22 syndrome (CTS). (Tr. 24.) Plaintiff had surgery for CTS in 2000 (Tr. 250), subsequently  
23 experiencing substantial relief from pain and numbness (Tr. 145). In 2002, Dr. Zeidner, upon  
24 physical examination of Plaintiff’s upper extremities, noted decreased sensation bilaterally at  
25

1 approximately the C5 level, and diagnosed a probable C5 radiculopathy. (Tr. 146-147.) In  
2 response to the ALJ's question about ongoing CTS problems post-surgery, Plaintiff testified that  
3 she currently experiences pain in her right arm and right hand. (Tr. 369.) Plaintiff is right-  
4 handed. (*Id.*) Her handwriting is deteriorating, and pain can cause problems with dressing,  
5 grooming, and typing. (*Id.*) She must take breaks from typing after seven to ten minutes. (*Id.*)  
6 I find that the ALJ has failed to state specific reasons for his finding that no basis exists for a  
7 diagnosis of CTS.

8 Fourth, the ALJ did not address Plaintiff's migraine headaches. In her Disability Report,  
9 Plaintiff listed migraine headaches as among the conditions that limit her ability to work. (Tr.  
10 68.) She was diagnosed with and treated for migraine headaches by Drs. Koch, Hakeman, and  
11 Zeidner. (Tr. 249, 250, 338, 194, 199.) In September 2004, she reported having migraine  
12 headaches three times per month. (Tr. 337.) At her hearing, she testified that sitting too long,  
13 typing, or talking on the telephone gives her headaches. (Tr. 364.) I find that the record  
14 indicates that Plaintiff suffers from migraine headaches, and that the ALJ has failed to state any  
15 consideration of this consider this.

16 In summary, I find that the record supports that Plaintiff's hip bursitis, sleep disorder  
17 apart from sleep apnea, CTS, and migraine headaches may significantly limit her ability to do  
18 basic work activities, and that as consequence the ALJ was in error..

19 C. CREDIBILITY

20 Plaintiff argues that the ALJ erred in finding Plaintiff is not credible regarding the degree  
21 of pain she suffers and the nature and severity of the limitations her pain imposes on her  
22 functioning.

23 The ALJ is responsible for determining credibility, resolving conflicts in medical  
24 testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.

1995). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1982). The ALJ can reject a plaintiff's symptom testimony only if he makes specific findings, stating clear and convincing reasons for doing so. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993). In weighing a claimant's credibility, the ALJ may consider her reputation for truthfulness, inconsistencies either in her testimony or between her testimony and her conduct, unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment, her daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which she complains. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9<sup>th</sup> Cir. 1996). An ALJ notes any daily activities which "may be seen as inconsistent with the presence of a condition which would preclude all work activity." *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9<sup>th</sup> Cir. 1990). "Disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations." *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). A "disability claimant need not 'vegetate in a dark room' in order to be deemed eligible for benefits." *Id.* (citing *Cooper v. Bowen*, 815 F.2d 557, 561 (9<sup>th</sup> Cir. 1987)).

The ALJ found Plaintiff not credible, listing a number of factors in support of this conclusion. (Tr. 25-26.) First, the ALJ noted that Plaintiff's complaints are long standing, with symptoms dating back to at least 1998, and that she was able to continue working until the end of 2001, when she was hospitalized for diverticulitis and her business bordered on bankruptcy. (Tr. 25.) He found that there was no objective change in her impairments, and that her physician noted in September 2004 that she was much better than three years ago. (*Id.*)

The record demonstrates that while many of Plaintiff's symptoms date back to 1998, beginning with specialists in April 2002, she was consistent in her reporting of the gradual impact

1 and need for pain management. (Tr. 144.) She was treated for pain for approximately for two  
2 years by Dr. Zeidner, followed by Dr. Johnston for approximately another year. (Tr. 144-147,  
3 194-233, 317-332.) At the onset of her treatment with Dr. Zeidner, Plaintiff reported that she  
4 had begun to have pain approximately five to six years ago, and that the pain had worsened since  
5 then. (Tr. 144.) In the Daily Activities Questionnaire - Other Person, a friend reported that  
6 Plaintiff's pain has been worsening slowly and steadily over time since the mid 1990's. (Tr. 91.)  
7 Plaintiff reported to Dr. Dickinson in January 2002 that while her depression is lifelong, it was  
8 increasing, with the exacerbation dating back to November or December. (Tr. 277.)

9       Additionally, Plaintiff reported on her Pain Questionnaire that her pain has gotten worse  
10 over time, with new areas of pain occurring. (Tr. 101.) She stated on her Disability Report that  
11 the pain started in 1997, and became severe in May 2001, at which time she began to work fewer  
12 hours. (Tr. 68.) At the end of the year she was hospitalized with diverticulitis, after which her  
13 fibromyalgia and chronic myofascial pain made movement hard, causing her to be unsteady on  
14 her feet, confused, exhausted, and depressed. (*Id.*)

15       Her psychiatrist, Dr. Hakeman, noted in her September 2004 assessment that all  
16 Plaintiff's symptoms were much better than they were three years ago. (Tr. 338.) At the same  
17 time, she diagnosed major depression in full to partial remission, anxiety, fibromyalgia, and  
18 migraines, with a GAF of 60, with the highest in the past year being 60. (*Id.*) At that time,  
19 Plaintiff continued to be treated for chronic pain by Dr. Johnston, who diagnosed her with right  
20 SI joint pain and dysfunction, fibromyalgia with multiple areas of myofascial pain, and one area  
21 of severe muscle spasm. (Tr. 317, 318, 320.) In September she reported her pain as 5/10 on  
22 average, in November as 6/10 on average, and in January 2005 as 5/10 on average. (*Id.*)

23       I find that the only clear and convincing reason given by the ALJ's conclusion that there  
24 is no objective change in Plaintiff's impairments is Dr. Johnston's notation that she was much

1 better than three years ago. (Tr. 338.) This single reference in view of the entire record, and the  
2 term “better” is relative does not provide sufficient specificity for discrediting the Plaintiff.

3 Second, the ALJ cites Plaintiff’s travel as evidence in support of his finding that Plaintiff  
4 is not credible, while according little weight to her allegations regarding an essentially invalid  
5 approach to the travel (Tr. 25), which seems to imply that an invalid approach would be some  
6 evidence of consistency regarding disabling pain. The ALJ stated no reason for according little  
7 weight to this allegation. Plaintiff accompanies her husband on business trips to Europe because  
8 staying home alone is harder on her. (Tr. 99.) She uses a wheelchair in the airport and  
9 museums, and often spends the day in the hotel, rather than going out. (Tr. 99, 236, 314, 365. )  
10 On her most recent trip, she brought a friend to help her dress, bring her food, and help carry her  
11 bags, and she missed all but one of the group dinners. (Tr. 357, 358.) I find that the ALJ has  
12 failed to provide clear and convincing reasons regarding his conclusions respecting Plaintiff’s  
13 allegations regarding travel.

14 In addition, the ALJ cites *Anderson v. Shalala*, 51 F.3d 779, 780 (8<sup>th</sup> Cir. 1995) for the  
15 rule that travel may be viewed as inconsistent with allegations of disabling pain. In *Anderson*,  
16 the Court noted that the plaintiff failed to allege disabling headaches in her application, claimed  
17 to be free of back pain, failed to comply with her prescribed exercise regimen, and failed to keep  
18 a number of medical appointments. In contrast, Plaintiff’s currently alleged sources of disability  
19 were alleged in her application; she has not claimed to be free of pain; she has not failed to  
20 comply with treatment plans, nor has she missed appointments. Anderson’s travel consisted of  
21 several thousand miles in a truck, a trip that is not comparable to Plaintiff’s plane trips.  
22 Additionally, there were inconsistencies as to the cause of Anderson’s injuries, whereas there is  
23 no such inconsistency in the instant case. Finally, unlike Plaintiff, Anderson exhibited drug-  
24 seeking behavior, which the Court found further discredited her.

25 REPORT AND RECOMMENDATION

26 PAGE - 14

1 Third, the ALJ found inconsistencies between Plaintiff's testimony and the evidence  
2 regarding gallery work. (Tr. 25.) The ALJ noted that while Plaintiff testified that she had not  
3 worked at the gallery since 2001, the record indicates that she had worked at the gallery on a few  
4 occasions. (*Id.*) The ALJ noted that in June 2002, Plaintiff was able to stand for two hours for a  
5 gallery opening; in October 2003, she was able to stand for an hour and a half at a gallery  
6 opening, and was happy to be helping out; in October 2004, she was painting for an auction; and  
7 in December 2004, she reported having been busy at the gallery and having sold four paintings.  
8 (*Id.*)

9 Plaintiff's previous work was as a custom framer in the gallery owned by herself and her  
10 husband (Tr. 69), and her duties included hosting art receptions (Tr. 118). Plaintiff stated that  
11 she had become unable to do custom framing since December 2001 (Tr. 68); she also testified at  
12 her hearing that she had done no gallery activity since then (Tr. 357).

13 I find that the only clear indication in the record that Plaintiff has worked in the gallery  
14 since December 2001 is that she was able to help for up to one and a half hours with a show in  
15 October 2003. (Tr. 244.) The record is unclear as to how she helped. It is also unclear as to  
16 whether she helped for the two hours she stood in the gallery in June 2002. (Tr. 227.) Painting,  
17 whether for auctions or otherwise, was not part of her past gallery work. (Tr. 69, 118.) Nor is it  
18 clear from the record that the auction was connected with the gallery, nor that Plaintiff  
19 participated in the auction itself, apart from her work being featured there. (Tr. 314.) It is also  
20 not clear from the record whether the pieces she sold in December 2004 involved her being  
21 engaged in a sales capacity at the gallery, or if she was even at the gallery when they sold. (Tr.  
22 339.) Given that her husband runs the gallery, the fact that Plaintiff reported that things had been  
23 busy is not clear evidence that she was a part of that business. I find that Plaintiff potentially  
24 worked in some capacity approximately 3.5 hours between December 2001 and October 2004,

1 which I find to be insubstantial and not significantly inconsistent with her claim of no gallery  
2 activity since December 2001, particularly as there is nothing in the record suggesting that she  
3 worked as a framer during this period. Consequently, I do find that this is not a clear or  
4 convincing reason for finding Plaintiff not credible.

5 Fourth, the ALJ found Plaintiff's ability to participate in certain activities as belying her  
6 allegations of disability. (Tr. 25.) In support of this conclusion, he noted Plaintiff's ability to  
7 travel, paint, perform in a play, and sing with choral group. (*Id.*) He also noted that she  
8 performed a memorial service, used a torch on glass beads, and was involved in Tai Chi and  
9 yoga. (*Id.*)

10 Plaintiff reported on her Pain Questionnaire that yoga helps to relieve her pain. (Tr.  
11 102.) She reported to Dr. Johnston that she tried, among other things, Tai Chi and yoga for  
12 pain. (Tr. 327.) She testified at the hearing that she tried Tai Chi, but that it was a bit strenuous  
13 for her. (Tr. 361.) As part of her pain management plan, Dr. Zeidner encouraged Plaintiff to  
14 continue with stretching activities. (Tr. 195-203, 206-211, 213, 231.) Plaintiff reported using  
15 yoga for stretching exercises. (Tr. 220.) Dr. Zeidner also specifically recommended that Plaintiff  
16 return to yoga as part of her treatment plan. (Tr. 147.) Accordingly, I find that rather than  
17 belying her allegations of disability, Plaintiff's yoga and Tai Chi activities support such  
18 allegations, given that they were undertaken as part of her treatment plan, as prescribed by her  
19 pain management physician.

20 Plaintiff reports that she paints approximately 2-3 hours per week (Tr. 99), only 1/8th the  
21 amount she previously painted (Tr. 360), and often must stop painting suddenly (Tr. 102).  
22 Plaintiff reported that she used a torch on September 3, 2003 to make glass beads. (Tr. 256.)  
23 She performed a memorial service in January 2004. (Tr. 238.) In December 2004, Plaintiff  
24 reported "singing a lot" with a group. (Tr. 339.) She reported that she was an actor in a play in  
25



1 August 2002. (Tr. 269.) She also reported “lots of pain” in connection with dress rehearsals for  
2 the play (Tr. 227), and testified to an inability to show up on a regular basis (Tr. 366). I find that  
3 such activities are consistent with an attempt to lead a normal life in the face of limitation, as the  
4 case law permits she need not vegetate in a dark room in order to be deemed eligible for benefits.

5 Fifth, the ALJ noted that Plaintiff consistently reports her average pain level as only 5 on  
6 a scale of 1-10, and that this is a moderate level which does not necessarily prevent functioning.  
7 (Tr. 26.) The ALJ has cited no authority for his conclusion that this is a moderate level which  
8 does not necessarily prevent functioning.

9 Sixth, the ALJ concluded that personality traits are at issue in this case. (Tr. 26.) In  
10 support of this conclusion he relied on Dr. Sandvik’s evaluation, noting Plaintiff’s dependent and  
11 histrionic traits, and that she embraces the notion of disability. (*Id.*) I note that the record does  
12 not contain Exhibit 8F5 cited by the ALJ, and find that Plaintiff’s embracement of the notion of  
13 disability is not indicated at 8F4, the other citation provided by the ALJ. I further note that the  
14 ALJ’s conclusion on this point is based upon Dr. Sandvik’s evaluation, whereas I have found this  
15 insufficient. Whereas Dr. Sandvik diagnosed Plaintiff with dependent-histrionic personality  
16 features (Tr. 173), Drs. Strong, Koch, and Hakeman did not (Tr. 143, 250, 333). Dr. Strong  
17 described Plaintiff’s “style [as] one of feeling emotion strongly.” (Tr. 143.)

18 Finally, the Commissioner advances the ALJ’s consideration that motivation and the issue  
19 of secondary gain, arguing that it must be considered in assessing Plaintiff’s credibility due to the  
20 fact that her gallery has been in financial straits throughout the life of the disability application.  
21 (Tr. 26.) The record illustrates that Plaintiff applied for benefits in December 2002, and the  
22 hearing occurred in June 2005; this was the life of the application at the time of the ALJ’s  
23 decision. (Tr. 55, 353.) In November 2001, Plaintiff reported that she and her husband were  
24 declaring bankruptcy. (Tr. 283.) Dr. Strong stated that when she first started seeing Plaintiff in

1 December 2001, she was worried about bankruptcy because she could no longer help her  
2 husband in their business. (Tr. 168.) Two employees had to be hired to replace Plaintiff. (Tr.  
3 75.) By the time Dr. Strong stopped seeing Plaintiff in May 2002, people had stepped forward  
4 to help with business concerns. (Tr. 168.) Moreover in answer to the ALJ's question about  
5 bankruptcy, Plaintiff testified that it had been avoided due to donations and fundraising efforts by  
6 gallery artists, and that the gallery was holding its own. (Tr. 372.) I find that the record  
7 indicates that Plaintiff's financial straits were caused by her inability to work. I also find that the  
8 record indicates that Plaintiff's financial straits had subsided by May 2002, approximately two  
9 years before the hearing, and remained at bay at the time of the hearing. Thus, I do not find  
10 secondary gain to be a clear and convincing reason.

11 In summary, I find that certain reasons provided by the ALJ in support of his non-  
12 credibility finding are not clear and convincing..

13 D. RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT

14 Lastly, Plaintiff argues that the ALJ failed to include all exertional and non-exertional  
15 limitations in the residual functional capacity (RFC) assessment, and erred in finding she could  
16 return to past work. The ALJ must assess all the evidence to determine the claimant's capacity  
17 for work despite her impairments. 20 C.F.R. §§ 404.1545(a), 416.945(a). The ALJ must  
18 evaluate the claimant's "ability to work on a sustained basis." 20 C.F.R. §§ 404.1512(a),  
19 416.912(a).

20 The ALJ found that Plaintiff's fibromyalgia is a severe impairment. The ALJ also found  
21 that the nature of Plaintiff's impairments is such that her activities and credibility are critical as  
22 "there is little objective medical evidence . . . [and her] treating sources have issued no opinions  
23 concerning the claimant's ability to function." Based on his non-credibility finding and his  
24 assessment of the medical records, the ALJ found that Plaintiff has no nonexertional limitations

1 of any significance, and that her past work is within her functional capacity.

2 The records from Dr. Zeidner document fibromyalgia with cervical and lumbar  
3 myofascial pain, with recurrent flares occasionally noted. (Tr. 195-232.) Dr. Johnston's records  
4 document right SI joint pain and dysfunction, multiple areas of myofascial pain, with one area of  
5 severe muscle spasm in the right trapezius and cervical paraspinal muscles. (Tr. 317-322.) Dr.  
6 Dickinson assessed Plaintiff with chronic pain (Tr. 270, 280, 291), chronic pain syndrome (Tr.  
7 271), areas of muscle spasm especially in the trapezius (Tr. 283), very marked trigger points at  
8 the SI joints and superiorly and laterally to those bilaterally (Tr. 291). Treating doctors  
9 documented Plaintiff's slow and/or antalgic gait and cane usage on numerous occasions. (Tr.  
10 195, 197-203, 206-207, 209-211, 213-214, 317-18, 330.) Dr. Dickinson, Plaintiff's primary care  
11 physician for four years, noted in her January 2002 treatment plan that she would support  
12 Plaintiff's claim for disability based on fibromyalgia. (Tr. 280.) Dr. Koch diagnosed her as  
13 unable to work due to fibromyalgia, with a GAF of 55. (Tr. 247.) Dr. Strong assessed  
14 Plaintiff's GAF as between 51 and 60. (Tr. 143.) Dr. Hakeman assessed her GAF as 60. (Tr.  
15 338.)

16 Accordingly, I find that the record contains opinions from Plaintiff's treating sources  
17 concerning her functional limitations which contravene the ALJ's analysis. Plaintiff's doctors  
18 have consistently diagnosed her as suffering from chronic pain, and assessed her functioning as  
19 between 51-60. One specifically opined that she is "unable to work" due to fibromyalgia, and  
20 another stated that she would support Plaintiff's claim for disability based on fibromyalgia, thus  
21 implying an inability to work. In addition, Plaintiff herself supplied details regarding her physical  
22 limitations in her application documentation and testimony.

23 Furthermore, the nature of the impairment, i.e., chronic pain due to fibromyalgia, is of  
24 importance in this case. According to Plaintiff, her disability is based on an inability to work on a

1 sustained basis due to pain, which either prevents her from working, or is exacerbated by  
2 working. The record sets forth several reasons: a) in her Disability Report that she reduced her  
3 work hours initially due to pain, and that the severity of the pain made her unable to predict  
4 when she could come into work, making her an unreliable employee (Tr. 68); b) in her  
5 Activities of Daily Living and Socialization report, she stated that the time she spent on activities  
6 varied depending on the severity of her pain (Tr. 82), that she could no longer commit to being  
7 somewhere at a regular time, and that there are days she cannot get out of bed (Tr. 83.) c) in the  
8 Daily Activities Questionnaire - Other Person, a friend reported that Plaintiff has significant pain  
9 on any given day, and that her attention span depends on her discomfort level. (Tr. 91); d) in  
10 her Pain Questionnaire, Plaintiff reported that her pain is constant but the severity fluctuates, and  
11 that stress, overactivity, standing too long, and over-concentration exacerbate it (Tr. 10); e) In a  
12 letter to the Social Security Administration, Plaintiff stated that chronic pain makes her life  
13 unpredictable, and that she does not know whether she will be bedridden on any given day, or  
14 able to drive or walk. (Tr. 107.)<sup>2</sup>

15 I find that because the ALJ failed to fully consider evidence from the treating sources and  
16 from Plaintiff herself regarding the degree of her pain, he consequently failed to fully take into  
17

---

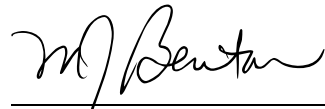
18 <sup>2</sup> Plaintiff reported to Dr. Zeidner that her pain was exacerbated by standing and physical  
19 activity. (Tr. 144.) She opined that a pain treatment had not been effective due to her activity  
20 level following the treatment. (Tr. 230.) She reported to Dr. Koch that fibromyalgia prevented  
21 regular attendance at work, and that she could not dependably make appointments with  
22 customers. (Tr. 243-44.) She reported to Dr. Johnston that she takes several rests during the day  
23 in an attempt to alleviate the pain. (Tr. 326-27.) She testified that she has approximately two  
24 normal days per week and three to four good days a month. (Tr. 359.) When she began reducing  
25 her work hours, she found that working three hours on one day would require two days to  
26 recuperate. (Tr. 362.) She testified that she was no longer working due to her inability to  
maintain a regular schedule as a result of the unpredictability of the pain. (Tr. 362.) Finally, she  
testified that her pain has gotten better since discontinuing work. (Tr. 371.)

1 consideration Plaintiff's exertional and non-exertional limitations in reaching his conclusions  
2 regarding her RFC and ability to return to past relevant work.

3 VIII. CONCLUSION

4 The Commissioner's determination to deny Plaintiff Disability Insurance Benefits is not  
5 supported by substantial evidence in the record as a whole nor free of legal error. Based on the  
6 record evidence, the undersigned recommends that the Commissioner's decision be REVERSED  
7 and REMANDED for further proceedings.

8 DATED this 3<sup>rd</sup> day of January, 2007.

9  
10  
11 

12 MONICA J. BENTON  
13 United States Magistrate Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25